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No. 97-1256

In the

Supreme Court of the United States

October Term, 1997

SINCLAIR OIL CORPORATION,
a Wyoming corporation,
Petitioner,

v.

COUNTY OF SANTA BARBARA, a political subdivision of the State of California; and SANTA BARBARA COUNTY BOARD OF SUPERVISORS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a federal court may abstain from adjudicating a ripe federal claim under the Just Compensation Clause merely because the property owner could pursue an analogous claim under a parallel state constitutional provision.

2. Whether a person is precluded from seeking relief for a violation of his substantive due process rights merely because that claim arose from government conduct that might possibly have effected a compensable taking as well.

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INTEREST OF THE AMICUS CURIAE

Pacific Legal Foundation files this amicus curiae brief in support of petitioner Sinclair Oil Corporation (Sinclair).[1] PLF has participated in numerous cases before this Court involving issues arising under the Takings and Due Process Clauses of the United States Constitution. PLF attorneys were counsel of record for the property owners in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), one of the decisions that forms the basis for Sinclair's claims in the present case. *See* Petition for Certiorari (Pet.) 6, 14, 21-23. More recently, PLF attorneys were counsel of record for the petitioner in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), this Court's most recent decision concerning the ripeness doctrine in takings litigation. PLF appeared as amicus curiae in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Finally, PLF has filed an amicus curiae brief in support of the pending petition in No. 97-1028, *Macri v. King County*, which concerns the relationship between substantive due process and takings, one of the questions here.

In the present case, PLF supports the petition for writ of certiorari, arguing that the decision below creates a substantial conflict among the federal courts of appeals in two separate respects, namely, the circumstances in which a federal court may abstain from adjudicating a ripe federal takings claims and the ability of a property owner to assert a substantive due process claim based on government conduct that might possibly give

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[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this amicus curiae brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution to the preparation or submission of this brief.

rise to a takings claim as well. PLF is concerned that the Ninth Circuit's decision places additional hurdles—hurdles that are unjustified by either precedent or wise judicial administration—to the prompt resolution on the merits of federal takings claims by federal courts. In addition, PLF is concerned that the Ninth Circuit's decision improperly denies individuals access to the federal courts to seek relief from arbitrary and capricious government conduct that affects private property. PLF's public policy perspective and litigation experience in support of private property rights and other individual rights will provide this Court with a valuable additional viewpoint with respect to the constitutional issues presented.

SUMMARY OF ARGUMENT

In the decision below, the Ninth Circuit made two rulings that warrant review because they are in conflict with decisions of other federal courts of appeals.

First, the Ninth Circuit ruled that the district court should have abstained, on the basis of *Pullman* abstention, from hearing one of Sinclair's federal takings claims—a claim that the court of appeals specifically found to be ripe. Abstention from the exercise of federal jurisdiction is the exception, not the rule, and *Pullman* abstention is warranted only in those infrequent cases where the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law. As it had in past cases, the Ninth Circuit identified the California Constitution's analogue to the Just Compensation Clause as the "ambiguous state law" whose interpretation might obviate resolution of Sinclair's federal takings claim. Thus, the court below reasoned that if the California courts provided Sinclair compensation for a taking under state law, it might be unnecessary to address Sinclair's federal takings claim. But other federal courts of appeals, following the lead of this Court, have held that abstention is not

warranted merely because the challenged state action may also conflict with a state constitutional provision that is substantially similar to a protection found in the Bill of Rights.

Second, the Ninth Circuit ruled that Sinclair cannot pursue a substantive due process claim based on certain government conduct merely because Sinclair might have a takings remedy based on that conduct. But several courts of appeals have held to the contrary, ruling that the Takings Clause does not exhaust the Fifth Amendment's substantive protection for property. In addition, the highest court of California has issued a decision in irreconcilable conflict with the decision below, ruling that one cannot pursue a *takings* claim if one has a possible substantive due process remedy for the challenged government conduct.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION TO ADDRESS TWO SUBSTANTIAL CONFLICTS AMONG THE FEDERAL COURTS OF APPEALS

This case presents two questions about which the federal courts of appeals are in conflict.

A. The Ninth Circuit's Decision to Abstain from Hearing Petitioner's Concededly Ripe Federal Takings Claim Merely Because Petitioner Had an Analogous Claim Under the State Constitution Is in Conflict with the Decisions of Several Courts of Appeals and of this Court

The court below concluded that one of Sinclair's federal takings claims was ripe for adjudication; this conclusion was correct. The court nonetheless refused to adjudicate that claim, ruling that it was appropriate to "abstain" in favor of possible resolution of the matter in the state courts; this ruling was error and in conflict with the decisions of several federal courts of appeals.

1. The Ninth Circuit Correctly Ruled That Sinclair's Federal Facial Takings Claim Was Ripe

As described by the court below, Sinclair asserted that the Goleta Community Plan (Plan) adopted by respondent Santa Barbara County (County), "on its face, constitutes a taking of [Sinclair's] More Mesa property for which just compensation is due under the Fifth Amendment." Petition Appendix (Pet. App.) A-6. This assertion translated into two distinct federal takings claims, one of which was based on the following categorical requirement of the Plan: "A minimum of 20% of [More Mesa] shall be dedicated to the County or another appropriate public agency and/or private organization to be set aside for public use." Pet. App. E-5. Sinclair alleges that "[t]his exaction demand is illegal [under the Fifth Amendment] because it lacks any essential nexus to any burdens which any proposed development will place on the public, and *a fortiori* it precludes any ability to discern if the exaction bears a 'rough proportionality' to those burdens." Pet. 6 (citing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 390 (1994)). In short, Sinclair alleges that the Plan's dedication requirement "does not substantially advance a legitimate state interest." Pet. App. A-9. Although the Ninth Circuit dismissed Sinclair's other takings claims as *not* ripe, the court ruled unequivocally that this "federal facial taking[s] claim . . . *is* ripe." *Id.* (emphasis in original).

Respondents can be expected to contest this ruling on the ground that Sinclair neither submitted to the County a proposal to develop the More Mesa property nor sought compensation from the County in the state courts. In certain circumstances, of course, a property owner must "obtain[] a final decision regarding how it will be allowed to develop its property" in order to ripen its federal claim that a land use ordinance effects a compensable taking. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190 (1985). In other circumstances, moreover, a federal takings

claim does not ripen until the property owner "seek[s] compensation through the procedures the State has provided for doing so." *Id.* at 194. The Ninth Circuit correctly concluded, however, that neither *Williamson County*'s "finality" requirement nor its "state procedures" requirement applied to this particular claim of Sinclair's.

As this Court made quite clear in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the finality requirement simply does not apply where a property owner "mount[s] a *facial* challenge to the ordinance," such as by alleging that "the ordinance does not 'substantially advance' a 'legitimate state interest' no matter how it is applied." *Id.* at 534 (quoting *Nollan*, 483 U.S. at 834). Because this is precisely the allegation made by Sinclair in the present case, *Williamson County*'s finality requirement does not apply here. *Accord* Pet. App. A-6 n.2 ("Sinclair vigorously maintains that its federal claims involve only facial challenges to the Plan, and a fair reading of the complaint supports this assertion.").

As for *Williamson County*'s state procedures requirement, the Ninth Circuit relied on *Yee* in holding that the requirement was inapplicable here. *See* Pet. App. A-8 (citing and quoting *Yee*, 503 U.S. at 533-34). Although we have no quarrel with the Ninth Circuit's analysis in this regard, the court's conclusion was surely right for the more fundamental reason that state procedures were "unavailable" to Sinclair. *Williamson County* itself held that a property owner need not utilize a state's procedures if he "show[s] that the inverse condemnation procedure is unavailable or inadequate." 473 U.S. at 197; *accord, e.g., Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1665 n.8 (1997) ("Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a taking[s] suit in federal court, *unless the State does not provide adequate remedies for obtaining compensation*." (emphasis added)). In the present case, Sinclair *did* seek to utilize California's procedures for obtaining compensation by

invoking federal diversity jurisdiction to bring "a declaratory judgment action joined with a claim for inverse condemnation" under state law. Pet. App. A-11; *see also id.* n.4. The Ninth Circuit, however, affirmed the dismissal of Sinclair's state-law takings claim, reasoning that "the courts of [California] would adjudge this inverse condemnation claim to be . . . unripe" and would therefore refuse to adjudicate it. Pet. App. A-12 to -13. Consequently, despite Sinclair's affirmative efforts to invoke California's state-law inverse condemnation procedures, those state procedures were "unavailable" as a matter of law.

In short, Sinclair was excused from both requirements of *Williamson County* with respect to its federal takings claim that the dedication requirement of the County's Plan, on its face, failed to substantially advance a legitimate government interest. Accordingly, that claim was ripe for adjudication.

2. The Ninth Circuit Erroneously Invoked *Pullman* Abstention to Refuse to Resolve Sinclair's Ripe Federal Claim, Thereby Creating a Circuit Conflict

Having correctly found ripe Sinclair's "federal facial taking[s] claim to the extent it asserts the Plan does not substantially advance a legitimate state interest," Pet. App. A-13, the Ninth Circuit nevertheless refused to adjudicate the claim. Instead, the court of appeals ordered the district court to "refrain from presently addressing this claim under the reasoning of *Railroad Comm[ission of Texas] v. Pullman Co.*, 312 U.S. 496 (1941)." Pet. App. A-13 to -14. But the court's invocation of *Pullman* abstention was error in the circumstances of the present case. This error, moreover, puts the decision below in conflict with the decisions of this Court and of several courts of appeals.

This Court has recently described *Pullman* abstention as a mechanism "[d]esigned to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues." *Arizonans for Official English v. Arizona*, 117 S. Ct.

1055, 1073 (1997). It is a mechanism appropriately invoked in cases where "the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law," *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1716, 1721 (1996). The application of *Pullman* abstention in the takings context is exemplified by *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), which involved both a federal constitutional question (the amount of compensation due for condemnation of certain property for public use) as well as an antecedent state-law issue (whether the city had authority under state law to condemn the property). Because the meaning of the relevant state statute was reasonably "disputed," *id.* at 29, and because a construction of the statute depriving the city of the power to condemn would be "decisive" in that it would obviate resolution of the federal constitutional question, *id.* at 27, this Court approved the district court's order "staying [federal] proceedings pending the institution of a declaratory judgment action and subsequent decision by the [state courts]," *id.* at 30.

By contrast, on the same day as it decided *Thibodaux*, this Court *dis*approved a different district court's decision to stay federal proceedings involving a county's exercise of eminent domain pursuant to state law. Unlike *Thibodaux*, in *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 196 (1959), "the state law that the District Court was asked to apply [was] clear and certain." This Court considered it an "established principle that Federal District Courts should apply settled state law without abstaining from the exercise of jurisdiction even though this course would require decision of difficult federal constitutional questions." *Id.* This established principle was applied more recently in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984), a takings case in which the Court held that *Pullman* abstention was inappropriate: "federal courts need not abstain on *Pullman* grounds when a state statute is not fairly subject to an interpretation which will render unnecessary adjudication of the federal constitutional question." As *Midkiff*

explained, "*Pullman* abstention is limited to uncertain questions of state law because '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.'" *Id.* (alteration in original) (quoting *Colorado River Conservation District v. United States*, 424 U.S. 800, 813 (1976)).

The County Plan's requirement that Sinclair dedicate at least 20% of its More Mesa property for public use is neither ambiguous nor uncertain. Rather, the Plan *unambiguously* provides that "[a] minimum of 20% of the site *shall be* dedicated" by Sinclair. Pet. App. E-5 (emphasis added). As in *Midkiff*, "[t]here is no other provision of the [County's Plan]—or, for that matter, of [California] law—which would suggest that [the Plan] does not mean exactly what it says." 467 U.S. at 236-37. Therefore, because "'the naked question, uncomplicated by [ambiguous language], is whether the [dedication requirement] is unconstitutional,' abstention from federal jurisdiction is not required." *Id.* at 237 (first alteration in original) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971)). In addition, *Midkiff* emphasized that not only is abstention "not required" in such circumstances, but abstention is categorically "*not to be ordered* unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction"—an option not available in the present case. *Id.* (emphasis added) (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 n.14 (1967)).

The court below did not purport to find the County Plan's dedication requirement to be uncertain or susceptible of a limiting construction. *Cf.* Pet. App. A-15 ("Sinclair does not raise a novel claim of statutory interpretation."). Rather, as its basis for invoking *Pullman* abstention, the Ninth Circuit looked to a different provision of state law as a potential means of obviating resolution of the federal constitutional question raised by Sinclair's takings claim: "Certainly, if the California courts provide Sinclair just compensation for a taking under state law, it might be unnecessary to address [Sinclair's] federal taking[s] claim." Pet. App. A-14. That is, given an opportunity, "a state

court might avoid the federal constitutional issues by deciding that an illegal taking under the *California Constitution* has occurred." *Id.* (emphasis added) (quoting *Sederquist v. City of Tiburon*, 590 F.2d 278, 282 (9th Cir. 1978)). In short, the court below held as a general matter that a "case meets the criteria for *Pullman* abstention" whenever adjudication of a federal takings claim "might" be rendered unnecessary by a property owner's pursuit of compensation under a state analogue to the federal Just Compensation Clause. *Id.* at A-14, A-15.

In *Midkiff*, however, this Court unanimously rejected that very proposition. Having found fault with the notion that abstention was appropriate because the relevant state statute was ambiguous, the Court found "equally faulty" the suggestion that "*Pullman* abstention was required because interpretation of the State Constitution may have obviated resolution of the federal constitutional question." *Midkiff*, 467 U.S. at 237 n.4 (discussing Hawaii's Takings Clause, Haw. Const. art. I, § 20). This Court held unequivocally that "abstention is not required for interpretation of parallel state constitutional provisions." *Id.* This rule applies here, given the obvious parallel between the Fifth Amendment and Article I, Section 19, of the California Constitution,[2] two constitutional provisions that even the Ninth Circuit has recognized as being "highly similar." *Sederquist*, 590 F.2d at 282.

In addition to clashing with *Midkiff*, the Ninth Circuit's decision to abstain solely on the basis of a parallel state constitutional provision is in conflict with the decisions of several courts of appeals. The Eleventh Circuit's decision in *Henley v. Herring*, 779 F.2d 1553 (11th Cir. 1986), is exemplary in this regard. In that land use dispute, the plaintiff property owners

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[2] *Compare* U.S. Const. amend. V ("[N]or shall private property be taken for public use without just compensation.") *with* Cal. Const. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.").

"sought relief under the Alabama constitution as well as under the federal constitution, and the federal constitutional issues might [have been] mooted by a prior state court application of state law." *Id.* at 1556. Still, the court of appeals found abstention unwarranted. Noting that abstention "is justified 'only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest,'" *id.* (quoting *County of Allegheny*, 360 U.S. at 188-89), the Eleventh Circuit held that "abstention is not required simply because the challenged state action may conflict with a 'broad and sweeping' state constitutional provision that is substantially similar to a protection found in the federal Bill of Rights," *id.* (footnote omitted).

Also in conflict with the Ninth Circuit's decision below are decisions of the First, Second, and Fourth Circuits, all of which recognize that *Pullman* abstention is inappropriate where the only potentially determinative issue of state law arises out of a state constitutional provision that parallels the federal constitutional provision undergirding the plaintiff's claims. *See Cuesnongle v. Ramos*, 835 F.2d 1486, 1492 n.6 (1st Cir. 1987) ("[A]bstention should not be used to determine the content of a state constitutional provision which parallels the federal constitution."); *Gueney v. Roache*, 833 F.2d 1079, 1083 (1st Cir. 1987) ("[W]here state and federal constitutional provisions are parallel, the state provision is unlikely to be any more ambiguous than the federal provision, and abstention is unnecessary."); *United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 596 (2d Cir. 1989) ("Because the provisions of the Fourteenth Amendment and Article I, Section 11 of the New York Constitution impart an *identical* framework of analysis, there is no affront to the state's interests that warrants deference in the exercise by a federal court of its jurisdiction."); *id.* (noting that the Supreme Court "has previously determined that abstention is not required for interpretation of parallel state constitutional provisions"); *National Capital Naturists, Inc. v. Board of Supervisors of Accomack County*, 878 F.2d 128, 133 (4th Cir.

1989) ("The presence of parallel state and federal constitutional claims does not in itself provide sufficient reason for a federal court to abstain.").[3]

For these reasons, the Ninth Circuit erred in abstaining from hearing a ripe federal takings claims merely because petitioner had a takings claim under a parallel state constitutional provision. In so doing, the court below entered a decision in conflict with decisions of other federal courts of appeals on an important issue of takings procedure. Exercise of this Court's certiorari jurisdiction is therefore warranted under Rule 10(a).

B. The Ninth Circuit's Dismissal of Petitioner's Ripe Substantive Due Process Claim Merely Because That Claim Arose from Conduct That Allegedly Effected a Taking Is in Conflict with the Decisions of Several Courts of Appeals

In addition to asserting claims under the Takings Clause, Sinclair also asserted a claim that the County's adoption of the Goleta Community Plan violated Sinclair's substantive due process rights. The Ninth Circuit found this latter claim to be ripe, yet dismissed it for failure to state a valid cause of action. *See* Pet. App. A-9 to -10. As the panel below recognized, this dismissal was dictated by the Ninth Circuit's en banc decision in *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996), which had "expressly refuted the notion that substantive due process claims can apply where the government has allegedly

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[3] Although the Ninth Circuit invoked only *Pullman* abstention, we note for the sake of completeness that abstention was unwarranted on *any* ground. Sinclair's facial challenge to the dedication requirement of the County's Plan surely comes within the rule, restated by this Court less than three months ago, that "'a facial challenge to an allegedly unconstitutional . . . zoning ordinance' is a claim 'which we would assuredly not require to be brought in state courts.'" *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 531 (1997) (ellipsis in original) (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 372 (1989)).

effected a taking violative of the Fifth Amendment." Pet. App. A-9. By its own terms, *Armendariz* held that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." 75 F.3d at 1325-26, *quoted in* Pet. App. A-9 to -10. That is, the mere possibility of a takings claim is sufficient to strip a property owner of any remedy for violations of his well-established right to be free from "arbitrary and capricious" government conduct.

The Ninth Circuit's *Armendariz* rule, as applied by the court below, stands on the thin side of a massive conflict among the federal courts of appeals. This conflict is the primary basis for the pending petition for certiorari in No. 97-1028, *Macri v. King County*, which seeks review of yet another Ninth Circuit decision applying the *Armendariz* rule, namely, *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997). Because PLF's amicus curiae brief in *Macri* sets forth the circuit conflict in great detail, we confine ourselves here to the highlights.

For its conclusion that a property owner has no substantive due process claim in those "contexts" also addressed by the Takings Clause, the Ninth Circuit relied on the statement that "'[w]here a particular amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."'" *Armendariz*, 75 F.3d at 1319 (quoting *Albright v. Oliver*, 114 S. Ct. 807, 813 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))). Yet the D.C. Circuit, quoting this exact same statement, has held that "in this circuit at least, . . . the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition." *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (considering

the plaintiff's substantive due process claim on its merits). The Third Circuit necessarily reached the identical conclusion in *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592, 596 (3d Cir.), *cert. denied*, 116 S. Ct. 352 (1995), when it dismissed the plaintiff's takings claims but nonetheless proceeded to address (in a favorable manner) a substantive due process claim arising from the same official conduct. Likewise, the Eleventh Circuit in *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997), addressed the plaintiffs' claims under "the arbitrary and capricious substantive due process protections" of the Constitution even after it had dismissed all of the plaintiffs' takings claims.[4]

In addition to standing in conflict with decisions of other federal courts of appeals, the Ninth Circuit's substantive due process ruling also creates a conflict with the highest court of California. In *Kavanau v. Santa Monica Rent Control Board*, 66 Cal. Rptr. 2d 672, 686 (1997), *cert. denied*, 118 S. Ct. 856 (1998), the California Supreme Court held that "a remedy for [a substantive] due process violation, if available and adequate, obviates a finding of a taking."[5] The court therefore held that "[t]he remedy of future rent adjustments available to Kavanau

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[4] Like the Ninth Circuit, the Tenth Circuit recently relied on *Graham* to conclude that a property owner's substantive due process claims were "subsumed within the more particularized protections of the [Takings] Clause." *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (alteration in original) (internal quotation marks omitted). *See also* Pet. 27-28 & n.16 (discussing *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992), and other cases and commentators illustrating and analyzing the conflict among the federal courts of appeals).

[5] The discussion that accompanied this holding, which cited several of this Court's takings decisions but *no* state-court decisions, *see* 66 Cal. Rptr. 2d at 686, indicates clearly that the state supreme court was interpreting *federal* law, namely, the Fifth Amendment's Takings Clause.

under the due process clause precludes a finding of a taking in this case." *Id.* at 688. As a result, a property owner who litigates in the state courts in California (which will necessarily apply *Kavanau*) must pursue a substantive due process claim instead of a takings claim.[6] By contrast, a person who litigates in the federal courts in California (which will necessarily apply the Ninth Circuit's decision below) must pursue a takings claim instead of a substantive due process claim—assuming he can overcome the Ninth Circuit's abstention doctrine discussed in the previous section. Obviously, these two legal regimes are in irreconcilable conflict with each other, an intolerable situation that can only be resolved by this Court.

Given the evident conflict among the courts of appeals on the question whether the Takings Clause "exhausts" the Fifth Amendment's substantive protection for property rights, and given the conflict between the highest court of California and the federal appellate court having jurisdiction over California, exercise of this Court's certiorari jurisdiction is warranted by Rule 10(a).

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[6] Note that under *Kavanau*, a property owner who alleges that a land use regulation "'does not substantially advance legitimate state interests'" will *always* have a potential substantive due process remedy available in state court, given the California Supreme Court's view of "[t]he similarity of this takings standard to the [requirements of] due process." 66 Cal. Rptr. 2d at 685 (quoting *Agins v. City of Tiburon*, 447 U.S. 247, 260 (1980)); *accord id.* (noting federal and state decisions that "apply standards under the takings clause similar to those that apply under the due process clause").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

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Respectfully submitted,

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